In The

# Supreme Court of the United States

October Term, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

*Petitioners,*

R. G. P. INCORPORATED, OTIS PETERSON, TRAVELERS INSURANCE COMPANY, STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

*Respondents (Petitioners on separate petitions),*

vs.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals on the Eighth Circuit**

## REPLY BRIEF OF ABOVE PETITIONERS

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COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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### A. Reply to Brief of United States.

The following points are made with respect to arguments related to the construction of Section 194 found in the briefs of the United States and the Amici in support of the respondents. References to ALTA amicus brief are to the brief of American Land Title Association.

1. The brief of the United States is replete with the suggestion that "doubtful expressions" must be resolved in favor of the Indians, that it is "plainly insuf-

ficient to justify a narrow reading of a provision intended by Congress to protect the Indian people." (See, for example, pp. 24-25, 28, 32, 37, 40-41, 43-44.) In fact, it may be fairly said that this is the crux of the government's entire case. However, inasmuch as Congress chose not to include Indian tribes or the United States within the scope of Section 194 and chose as well to limit its application to cases in which only "white persons" were on the other side, clearly " . . . the courts may not supply the words which Congress omitted. Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people." *United States v. First National Bank,* 234 U. S. 245, 262 (1914); *Rosebud Sioux Tribe v. Kneip,* 430 U. S. 584, 587 (1977).

2. The United States (25-26) and Amici (26) rely upon 1 U. S. C. § 1 to argue that the use of the singular term "an Indian" provides "no basis" for a restrictive interpretation of Section 194 "since singular and plural terms are generally used interchangeably in federal statutes." However, by its own terms 1 U. S. C. § 1 is inapplicable here for the general rules of construction set forth therein are to apply "unless the context shows that such words were intended to be used in a more limited sense." In this case the context clearly indicates an intention to use the word "Indian" in a more limited sense—the use of the singular word "himself" in obvious relation to the word "Indian," the change from the plural "Indians" to the singular "Indian" in 1834, other references in the 1834 Trade and Intercourse Act demonstrating that "an Indian" or "Indian" refer to an Indian individually and not to a tribe or to the United



States, the lack of interchangeability in the 1834 Act between the phrase "an Indian" and "Indian tribe," the provisions elsewhere in the 1834 Act for the property interests of an "Indian tribe" and the general distinction in 1834 between the litigation rights of Indians individually and Indian tribes. (See ALTA amicus brief, 11-15.) As this Court has held, the construction suggested by 1 U. S. C. § 1 is "not one to be applied except where it is necessary to carry out the evident intent of the statute." *First National Bank v. Missouri,* 263 U. S. 640, 657 (1924). Moreover, 1 U. S. C. § 1 merely provides that, unless otherwise intended, "words importing the singular number may extend and be applied to several persons or things . . . ." Such a rule does not contemplate the extension of the term "Indian" to include an "Indian tribe" which is a distinctly different and separate entity. (See ALTA amicus brief, 8-9.)

3. Although the United States attempts to support its argument that the term "white person" as used in the 1834 Act means "all non-Indians" by a comparative analysis with other sections of the Act (33-35), it ignores what such a comparative analysis indicates with respect to the meaning of the phrase "an Indian." Apparently it chose to do so because such an analysis clearly demonstrates that each reference in the 1834 Act to "an Indian" or "Indian" refers to an Indian individually and not to an Indian tribe or to the United States as trustee for the tribe. (ALTA amicus brief, 12-13.) It is well established that when the same term is used in different sections of the same statute, it is generally presumed to mean the same thing. (See cases cited, ALTA amicus brief, 12, 17.)

4. The United States (26-28 and Amici (27) claim that petitioners' construction of Section 194 would lead " . . . to the anomalous result that the burden of proof would differ in cases involving precisely the same substantive claims depending on who was the formal party to the suit." Such an argument misrepresents the position of petitioners. Section 194 is inapplicable herein because the Omaha Tribe and the United States, as trustee, are not "an Indian" *nor* are they litigating about the individually held property rights of an Indian. (ALTA amicus brief, 9.) Although we would not agree that the United States, as trustee, or a tribe may assert a claim on behalf of an individual Indian in litigation about his own "right of property," application of Section 194 does not turn, as the government suggests, upon "who was the formal party to the suit" but upon who was the real party in interest. That test is no different were a tribe to purport to assign its tribal land or the tribal claim for that land to individual Indians. (Amici, 27.)

5. The government asserts (26) that "the purpose of Section 194 . . . is equally applicable when a tribe, rather than an individual Indian, is a party, or when the United States brings suit as trustee for Indians." However, it is apparent that Section 194 was originally designed to remedy certain litigation obstacles encountered by individual Indians in cases against "white persons." (ALTA amicus brief, 7, 18.) It cannot be seriously argued that those obstacles continue to exist for the individual Indian given subsequent legislation directed toward the assurance of equal opportunity in litigation premised upon a universal basis and not limited



to any particular group. The Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1970). However, as this case itself aptly demonstrates, tribal claims to land are undertaken by the federal government or by the tribe itself or by both with significant resources and competent legal talent and therefore there is no present need to broadly interpret the scope of Section 194 beyond its terms.

6. The United States (30-32) and Amici (26) suggest that the difference between the burden of proof section as added to the 1802 Act by amendment in 1822 and as it read in the 1834 Act was merely a matter of "syntax," the 1822 version having been "somewhat awkward." They fail to explain, however, why Congress would not simply have changed "himself" to "themselves" and to have made the statute expressly applicable to "Indian tribes" *if* a broader application were intended *and if* "syntax" were the only concern.

7. The United States in effect concedes that there is no specific legislative comment concerning the meaning or purpose of Section 194. However, the government's brief states that the 1834 Act "appears to have been an outgrowth" of the Clark-Cass report made some five years earlier which report "indicates" that no changes were contemplated" by the change in language in the burden of proof section between the 1802 Act (as amended in 1822) and the 1834 Act (29). In fact, a review of the Clark-Cass report demonstrates that the government's reliance is misplaced. The annotation in the report with respect to Section 194 (Section 27 of the report) simply states that "[t]his enactment is taken from the fourth section of the act of May 6, 1822." Although the govern-

ment suggests (29, n.23) that in other sections of the proposed statute "where significant change was intended, the annotations so indicated," in fact that was not consistently the case. As the government itself concedes, Section 12 of the 1834 Act no longer required that conveyances by individual Indians be made by treaty as did the 1802 Act. Section 12, as it was enacted in the 1834 Act, is set out as Section 41 of the 1829 report, and the accompanying annotation merely states: "This is the 12th section of the last mentioned act" [the act of March 30, 1802].

8. The government argues that any connection between the 1834 exclusion of individual Indians from Section 12 and the limitation of the application of Section 22 (Section 194) to those cases in which "an Indian" was a party on one side is "at best, speculation." However, the government offers no evidence that these consistent changes were "wholly independent." Nor does the government respond to the differences in the nineteenth century between the general litigation ability of tribes on the one hand and individual Indians on the other, a distinction which Congress may also have had in mind in effectuating these changes. (ALTA brief, 15.)

9. The United States urges that an interpretation of the term "white person" to refer only to an individual of the Caucasian race "should be rejected because it is at odds with Congress' intent to protect Indians from the loss of their lands to non-Indians" (32) and "would make the applicability of the section turn on factors wholly irrelevant to Congress' purposes in enacting it." (50-51). However, "[t]he responsibility for the justice or wisdom of legislation rests with the Congress; and it is the province of the courts to enforce, not to make, the laws." *First National Bank, supra,* 234 U. S. at 260.



10. The United States suggests that Congress used the phrase "white person" in several sections of the 1834 Act "in contexts where it was clearly intended to refer to all non-Indians" (33-35). However, the examples they cite do not support their conclusion. It is not self-evident that the phrase "white person" in Section 20 was intended to include any non-Indian inasmuch as the authorization to search for suspected liquor may not have been intended to effectuate the prohibition in the first portion of the section with respect to all those within the prohibition. Similarly the reference in Section 7 to goods "of the kind commonly obtained by the Indians in their intercourse with the white people" is simply descriptive of the kind of goods to which the statute was intended to extend and may not be fairly equated with "any person other than an Indian" which persons are subject to the statute.

11. After arguing for a few pages (30-35) that a comparative analysis with other sections of the 1834 Act proves that "white person" was "evidently equated" with non-Indians, the government then argues for a few more pages (35-37) that Congress was so inconsistent in the use of various terms and phrases in the Act that a comparative analysis is useless. In support of the latter discussion various provisions are referred to which utilized the term "person" which the government contends at times included Indians and at times did not. However, clearly the term "white person" was more narrowly drawn and in no place in the 1834 Act included all "non-Indians."

12. The government attempts to distinguish *United States v. Perryman,* 100 U. S. 235 (1879) by suggesting that the meaning of "white person" in Section 16 does not govern its meaning in Section 22 and because "*Perryman* was grounded upon the peculiar legislative history of Section 16." However, there is no reason to construe the term "white person" as found in Section 22 of the 1834 Act to have a different meaning than the same term has in Section 16 of the same Act. Moreover, the language of Section 194 did meet a "peculiar legislative purpose;" namely, the fact that the problems individual Indians then encountered in litigation would usually have arisen when a "white person" was "on the other side." (ALTA amicus brief, 18.)

13. The United States (39-41) and Amici (24) concede that an interpretation of the term "white person" as including only Caucasians would raise "serious doubts" about the constitutionality of Section 194 "which can and should be avoided by construing the term to meaning "non-Indians." However, it is axiomatic that the language of the statute and the intention of Congress in enacting it may not simply be ignored in order to save a statute's constitutionality. As this Court has said in rejecting a similar contention in *Yu Cong Eng v. Trinidad,* 271 U. S. 500, 518 (1926):

> We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.



*See also, United States v. International Union,* 352 U. S. 567, 589 (1957); *Aptheker v. Secretary of State,* 378 U. S. 500, 515 (1964). Furthermore, if the term "white person" includes only Caucasians, the Court need not presently consider the constitutional question. On the other hand, if the term applies to all "non-Indians," the statute still is of doubtful constitutionality. (See ALTA certiorari brief.)

14. The United States argues that petitioners and their amici "greatly overestimate the impact Section 194 is likely to have" because most, if not all, cases cited are suits based upon the Indian Trade and Intercourse Act and "[t]he central issues in virtually all of these cases are issues of law . . ." (48-50). This argument grossly oversimplifies the nature of Indian land claims litigation and ignores the decisive role Section 194 might have in the resolution of those claims, particularly because the events complained of occurred so many years ago.

The Justice Department has elsewhere described Indian land claims litigation instituted under the provisions of the Indian Trade and Intercourse Act as "potentially the most complex litigation ever brought in the federal courts." Memorandum in Support of Plaintiff's Motion for Further Extension of Time to Report to the Court at 3-4, 5, *United States v. Maine,* Civil Nos. 1966-ND, 1969-ND (D. Me.). Those elements which a plaintiff tribe must show in order to establish a prima facie case include: (1) that it is or represents an Indian "tribe" within the meaning of the Act; (2) that the parcels of land at issue are covered by the Act as tribal land; (3) that the United States has never consented to the alienation of the tribal land; (4) that the trust relationship between the United

States and the tribe has never been terminated or abandoned. *Narraganset Tribe of Indians v. Southern Rhode Island Land Development Corp., et al.*, 418 F. Supp. 798, 803 (D. R. I. 1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 428 F. 2d 370 (1st Cir. 1975). Among numerous defenses to such claims are whether whatever interest the tribe once had in the lands at issue was lost by abandonment, laches or prescription, whether the defendants were such bona fide purchasers as to preclude recovery by the tribe. Obviously many of these issues and others which would have to be litigated are factual in nature in whole or in part and might well be ultimately determined by the operation of the burden of proof. That the United States would in one place in its brief state that Section 194 operates to place upon the "non-Indians" the burden of proving "whatever facts are necessary to show that Indian title was extinguished and good title vested in the non-Indian claimant" (46) and then later suggest that the petitioners and their amici "greatly overestimate" the potential impact of Section 194 (49) is difficult to comprehend.

**B. Reply to Brief of Native American Rights Fund.**

*Re-emergence Doctrine*

At page 23 of the brief of the Native American Rights Fund, it is stated: "Everyone agrees that the 2900 disputed acres were once reparian, that they were covered with water and eroded, and that they subsequently re-emerged on the opposite side of the Missouri River as a result of a change in the river's course. The Re-emergence Doctrine should be applied in these circumstanes to give effect to the purposes of the Omaha Indian Reservation, to prevent the extinguishment of Indian title without federal consent, and to avoid a windfall to the petitioners."



With regard to the windfall, Lakin paid $300,000 for the Blackbird Bend property he bought and invested another $700,000 clearing it and otherwise developing it for agriculture (R.2383). Wilson bought most of Lakin's Blackbird Bend property for $1,685,000 (R.2327). The windfall in this case is going to the Omaha Tribe under the Eighth Circuit decision. The Tribe lost land much of it of little value, and under the Court of Appeals' opinion, gets, in return, land of great value, made so in large part by the investment of the defendants and their predecessors in title.

As to the Re-emergence Doctrine—it has never been applied in such a case as this case. It applies only where the land re-emerges on the same side of the river as before, identifiable and in the same position relative to the river and other land as before. In *Beaver v. United States*, 350 F. 2d 4, at 11 (1965), the Court said:

> As an alternative theory of recovery, appellants raised a title claim under the doctrine of re-emergence. That doctrine rests upon "easy identification" of riparian land "lost" and "found" again by re-emergence from the stream bed. These elements are not here present.
>
> We agree with the government:
>
> "That doctrine has been applied by some state courts as an exception to the doctrine of accretion, but not in a factual situation such as is present in this case. In order for the doctrine to be applied in those states that recognize it, two things must occur: First, the water-course must move across and submerge

riparian land so that land formerly nonriparian is made riparian; then the watercourse must return to or near its original bed so that the riparian land that had been submerged is uncovered, or re-emerges.

• • •

"The United States' land to which the tract has accreted was riparian originally and one of the reasons for the doctrine of accretion is to allow that land to remain riparian. Philadelphia Co. v. Stimson, 223 U. S. 605, 624 [32 S. Ct. 340, 56 L. Ed. 570] (1912). Appellants here seek to apply the 're-emergence' doctrine to render nonriparian land that was originally riparian. This is directly contrary to the purposes of the exception.

• • •

"Stone v. McFarlin, 249 F. 2d 54, 55-57 (C. A. 10, 1957), cert. den., 355 U. S. 955 [78 S. Ct. 540, 2 L. Ed. 2d 531] • • • Anderson-Tully Co. v. Tingle, 166 F. 2d 224 (C. A. 5, 1948), cert. den., 335 U. S. 816 [69 S. Ct. 36, 93 L. Ed. 371], where the court stated (pp. 228-229): 'Where a river is a boundary and there is no avulsion, a land-owner can never cross the river to claim an accretion on the other side.'" (Appellee's Brief, pp. 15-17.)

*Title To Bed of River*

At page 20 of the Native American Rights Fund brief, *Choctaw Nation v. Oklahoma,* 397 U. S. 620, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970) is cited as holding that title to the beds of navigable rivers was vested in the Indian tribes. That case did hold that certain treaties between the United States and the Tribes did convey to the Tribes the bed of the Arkansas River even where that river was navagible. Both sides of the river were conveyed to the Tribes by some of the treaties, and one of them



described the boundary as "down the main channel of the Arkansas River". The Court said (397 U. S. 625):

> Finally, it must be remembered that the United States accompanied its grants to petitioners with the promise that "no part of the land granted to them shall ever be embraced in any Territory or State." In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding, on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.

The question of whether the United States, pursuant to the Treaty of 1854, conveyed the west side of the Missouri River bed to the Omaha Tribe is not a crucial issue in this case. But, it may be of some help in analyzing the Eighth Circuit's opinion in which that Court said (App. A.20): "Because the Tribe's right asserted to Indian trust land arises under federal law, we hold that the governing law is federal law." But, if the bed of the river was not conveyed by the United States to the Tribe but came to the Tribe under the law of Nebraska, then the ground given by the Eighth Circuit for its decision fails as to the shore of the Barrett Survey Area. That the law of Nebraska gave the bed of the Missouri River west of the middle of the main channel to the riparian owners was determined by the decision of the Supreme Court of Nebraska in *Kinkead v. Turgeon,* 74 Neb. 573, 104 N. W. 1061 (1905) and 74 Neb. 580, 109 N. W. 744 (1906).

The Treaty of 1854 did not fix the eastern boundary of the Reservation or locate the Reservation. It was later located and described by the surveyor Barnum with

its eastern boundary as the river (A.269, 270). The Treaty of 1854 unlike the treaties in the *Choctaw* case *supra,* contained no guarantee that the Reservation would not be embraced within a state. In view of the difference in the treaties and the closer analysis of the equal protection doctrine made in *Oregon v. Corvallis,* we think the Tribe did, indeed, acquire title to the river bed from the State of Nebraska, not from the United States.

**C. Reply to Brief of Omaha Tribe.**

The Petition for Certiorari of Wilson, et al. (No. 160) presented five questions for review. This Court granted certiorari limited to Questions 2 and 3. Nevertheless, Tribe's counsel in his brief presents seven questions for review of which Nos. 1 and 7 appear to be the equivalent of Petitioners' No. 5 which this Court did not undertake to review. It reads as follows:

> Whether the Court of Appeals erred in holding that the District Court's determination that Petitioners had proved by a preponderance of the evidence that the land in question is accretion to the Iowa riparian land or to the State of Iowa's portion of the bed of the river, is clearly erroneous.

Since we think Tribe's counsel is out of order in devoting two-thirds of his brief to argue a question that this Court did not choose to review, we will not undertake a full-scale reply to his argument on that subject. But, we would like to correct a few of the misstatements of fact in the Tribe's brief.



*The Barrett 1867 Survey and Meander Line*

At Page 9 of the Tribe's brief, it is asserted that the Barrett Survey was made during a period of extremely high water. There is no evidence to support such a claim. The regular high water periods of the Missouri occur in April (for a week or ten days) and in June (App. A.29, n.27). Barrett had surveyed the higher part of the Barrett Survey Area by April 19, but then he could not survey the lower part because it was inundated. He waited for the high water to recede and then he returned and surveyed the lower part of the peninsula on May 16, 1867. May is not normally a high water period. Even the Court of Appeals said that "Barrett's Survey established a meander line for the Nebraska *shore* of the Missouri River," (Emphasis ours) (App. A.5, n.3), not the bank or the ordinary high water mark. The eastern one and one-half miles or thereabouts of the Barrett Survey Area was described by Barrett on his map as "low sandy point" (T.Ex.26, 26a, R.20, 22). Some typical excerpts from Barrett's notes are (T.Ex.26d, 26e, R.20,22).

> The east part of Section 13 and most of fractional Section 24 is low and sandy and subject to frequent inundations, entirely worthless for cultivation.
>
> • • •
>
> Level and sandy, subject to frequent inundations.
>
> • • •
>
> Worthless for cultivation being almost entirely sand.
>
> • • •
>
> A mound was built but owing to the sand and frequent inundations it cannot long remain. Soil—sand.
>
> • • •

> The mounds on this line will not long remain. No permanent corner can be established. . . . low and level—soil worthless for cultivation being almost entirely sand.

This low sandy point was shore. It was below the ordinary high water mark, the line below which the land is submerged long enough each year to prevent upland type vegetation from growing on it. The meaning of "ordinary high water mark" is explained in *State, ex rel O'Connor, Attorney General, et al v. Sorenson, et al,* 222 Iowa 1248, 271 N. W. 234 (1937), as follows:

> One of the controverted questions herein relates to the location of the present high-water mark along the property in question. An accepted definition of "high-water mark" is set out in the case of *City of Cedar Rapids v. Marshall,* 199 Iowa 1262, loc. cit. 1264, 203 N. W. 932, 933, where this court said: "The term 'ordinary high-water mark' has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but it is the line to which high water ordinarily reaches. [Citing case.] "'High-water mark' means what its language imports—a water mark. It is coordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes." * * * *Bennett v. National Starch Mfg. Co.*, 103 Iowa 207, 72 N. W. 507; * * * *Houghton v. C., D. & M. R. Co.*, 47 Iowa 370."

Other cases are collected in *Words and Phrases* under "bed" and under "ordinary high water mark."

The shore portion of the Barrett Survey Area would be about 1,000 acres. No allotments were made of that area to individual Indians. It was worthless for agriculture. Trust allotments were made in the western part of the Barrett Survey Area, and in 1907, the river started eroding them away as the meander point at the northern edge of the Blackbird Bend Area started its southward migration. Between 1907 and 1927, all of the allotted lands were washed down the river and those which had not been converted into fee patented lands had been relinquished back to the Tribe in exchange for new allotments on higher ground. *See,* Wilson Exhibits A through P (R.104, 106, 110), Wilson Exhibit F4 (R.2059, 2061), Wilson Exhibit R (R.535, 592).



*The 1879 Missouri River Commission Map*

A copy of this map is shown in the Tribe's brief as Plate II on Page 13, but it does not have the retracement of the Barrett Survey of 1867 meander line superimposed on it. The copy in the Court of Appeals' opinion at App. A.11 does. Tribe's counsel asserts that this map was made during a period of "extremely high flow", "flood stage", "out of its banks". (Tribe's brief, Page 12). The Court of Appeals believed that claim (App. A.45). It said that the 1879 map was made when the River was as much as five feet above its ordinary high water level. It says, "The existence or non-existence of identifiable land in place could not have been accurately assessed at a time when the river's flow was abnormally high during floods which completely inundated the adjacent land." (App. A.46).

The 1879 map bears the notation, "surveyed June 16-26, 1879, Stage-high water." "High water" does not mean five feet above ordinary high water. It does not mean "abnormally high during floods which completely

inundated the adjacent land." If the river had been at flood state, the mapmaker would have so described it, "flood stage", not "high water." The Court of Appeals mistakenly accepted the Tribe's surveyors definition of ordinary high water.

Mr. Clark testified that for at least six months of the year, the river was considerably lower than its June 16 to 22, 1879 elevation. In plotting his high water mark on his Tribe's Exhibit 98, he reduced the water surface elevation of the river below that on Tribe's Exhibit 29, between 4 and 5 feet on each of the cross-sections. He said, "and this is as the water elevation of the river would usually be for the remaining—or at least six months of the year at these three areas." (R.281, 284). Clark thought that in using a surface level at or below which the water would be at least six months of the year, his surface level represented the ordinary high water mark used in a court of law to determine rights of riparian owners (R.285). He was wrong about that. But, five feet above the mean level for the year would not be flood stage or extremely high water on the Missouri River. The Government's expert, McQuivey, testified that the discharge at Sioux City for the period of June 16 to June 26, 1879 was approximately 160,000 cubic feet per second, high water not a flood (R.1493). The high discharge for 1879 was 220,000 cubic feet per second. The flood of 1881 had a maximum discharge of 600,000 cubic feet per second (R.1507). High discharge of 1876 was 300,000 cubic feet per second; for 1877, 200,000 cubic feet per second; and for 1878, 215,000 cubic feet per second (R.2943; App. A.42, n.41). So the discharge at the time the map was made was only two-thirds that of the high discharge of 1879 and very much



below the high discharge for each of the preceding years. Furthermore, if the river were at flood stage—out of its banks—during June 16 through June 26, 1879, when the 1879 survey was made, it would have covered the accretions laid down since 1867, not only Bar A, which even the Court of Appeals concedes was "land formed by deposition after the channel was abandoned (App. A.43), but accretions to the Nebraska shore in Sections 11 and 23 east of the Barrett meander line. It is noteworthy that those areas of Sections 11 and 23, as well as Bars A and C are shown with willows. Although the Court of Appeals concedes that Bar A was formed by deposition in the abandoned channel, and although the land or shore areas in Nebraska east of the Barrett meander line in Nebraska Sections 11 and 23 obviously were formed by deposition after 1867, the Court of Appeals considered that the existence of willows on Bar C (App. A.44), supported the "possibility that Bar C, located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits (App. A.44). Yet, there is nothing to indicate that the willows on Bar C were any older than those on Bar A or in Sections 11 and 23 east of the Barrett meander line. The sandbar willows are shrubs (Gorsuch, R.1391) which start to grow as soon as the seeds hit the sandbar and the water recedes (R.1390). They grow to as much as 10 inches the first year and 15 the next and so on (R.1391). The United States Engineers would show them on a map as soon as they are visible—about 12 inches high (Huber, R.2153).

Another mistake of fact was made by the Court of Appeals with respect to Bar C. The Court of Appeals said (App. A.43-44):

> The trial court also found that the land which had previously occupied the area shown as bar C on the 1879 map had been completely eroded away and that bar C had formed thereafter as a middle bar as the thalweg moved to the west. The Court observed: "If bar 'C' were land-in place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than willows by 1890."
>
> The 1890 reference is confusing and in obvious error. The area where bar C was located in 1879 is depicted on the 1890 map as "cleared" land.

The area where bar C was located in 1879 is not depicted on the 1890 map as "cleared" land. A comparison of Plate II (App. A.11), which is a copy of the 1879 map, and Plate V (App. A.57), which is Clark's composite of the 1890 map with Clark's omissions and additions, shows that the space marked by Clark "cleared" is in the northwest corner of Section 20, while the area of bar C is in the northeast corner of Section 19. The original 1890 map (W.Ex.P.3, R.1814, 1815; T.Ex.32, R.306, 307) shows the symbol for willows on the area formerly bar C as well as in the area north, south and west of the bar C area.

Another point to consider with reference to the 1879 map is that between 1867 and 1879, the thalweg in Blackbird Bend was shortened by about three miles. Shortening the channel steepens its slope and increases the speed of the water which, in turn increases its scour on the bottom and deepens the channel. Except for such degradation of the channel the bars shown on the 1879 map could very well have been submerged and therefore not shown on the map at all.



### *Joe Kirk, Squatter?*

For some vague purpose, Tribe's counsel hurls the epitaph "squatter" at Joe Kirk, deceased, who assembled title to most of the land in the Blackbird Bend Area. Mr. Kirk purchased land on the north high bank (the north half of the southeast quarter of Section 19, marked RGP, Inc. near the top of the map, which is Appendix F on the back cover of the white Appendix). In 1916, he built a cabin on the bar land south of his high bank land, and made it clear that he claimed it as accretion to his formerly riparian land. He quieted title in 1928 against one claimant. Over a period of time, he assembled the accretion land by getting quitclaim deeds and line fence agreements from other riparian landowners to the accretions to their land. In the Wilson abstracts and chain of title (W.Ex.W, Y, R.1787, 1791) we count ten patents issued by the United States to different tracts of high bank land through which Wilson traces his title, and in the chain of title and abstracts of RGP, Inc. (W.Ex.X, Z, R.1787, 1791) we count five such patents back to which RGP, Inc.'s title is traced.

### *Iowa's Ownership of the Bed of the River*

When Iowa became a state, it became the owner of the bed of the Missouri River from the ordinary high water mark on the Iowa side of the river to the middle of the main channel. It did not relinquish that ownership. The significance of that ownership so far as Wilson, Lakin and RGP, Inc. are concerned can be briefly explained. If a sandbar had surfaced on the Iowa side of the thalweg and while still a sandbar became attached

to the riparian land, ownership would be acquired by the riparian landowner as accretion to his land if and when the sandbar arose above the ordinary high water mark and achieved the status of fast land. On the other hand, if the sandbar became an island, that is, arose above the ordinary high water mark and evidenced its permanence by acquiring vegetation and suitability for cultivation before becoming attached to the riparian land, it would still be the property of the state after becoming so attached. In some cases there has been difficulty in determining the ownership as between the state and the riparian owner. In Blackbird Bend, settlement of that question was reached between the state and the Petersons and Lakin. Those private owners gave quitclaim deeds to the state to the land now claimed by the state, and the state withdrew its objections to quiet title decrees being entered against it as to the land now claimed by Lakin, Wilson and RGP, Inc. The result is that the state derives its title to the same land as accretion to the riverbed owned by it *and* as accretion to the riparian land, and Wilson, Lakin and RGP also derived their title both through the state and through the riparian owners. If their title is good through either source, it is good.

### *Tribe's Claim that Defendants Assumed Burden of Proof by Their Pleading*

Counsel for the Omaha Tribe asserts that the defendants assumed the risk of nonpersuasion independently of Section 194 because defendants alleged that they are owners of the Barrett Survey Area as accretion to the Iowa riparian land. Counsel for the tribe assert that



that allegation presents an affirmative defense and that under Iowa law, defendants have the burden of establishing their affirmative defenses. But counsel for the Tribe does not cite any authority to the effect that a claim of ownership of land as accretion to riparian land is an affirmative defense.

An affirmative defense is one which admits the facts of the adverse pleading but seeks to avoid their legal effect. *See* Rule 101, Iowa Rules of Civil Procedure; *Foods Inc. v. Leffler,* — Iowa —, 240 N. W. 2d 914, 920 (1976); Federal Rules of Civil Procedure, Rule 8(c).

Accretion would be provable under a general denial. Indeed, defendants denied that plaintiffs now own or ever owned the land in controversy because it is not the same land which occupied the particular area of latitude and longitude in 1867 but is new and different land deposited as accretion to the Iowa riparian land. *See Beaver v. United States,* 350 F. 2d 4 (C. A. 9, 1965), our principal brief, page 33. *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 722 (1959), cited in Tribe's brief at page 60, footnote 132, was one where both plaintiffs and defendant were or had been owners of land on the Iowa side of the river. The successful defendant and counterclaimant proved that plaintiffs' riparian land was entirely destroyed (eroded to below ordinary high water mark) so that defendant's land behind it became riparian and the accretions belonged to the defendant. Tribe's counsel's contention is inconsistent with the rule well established in Iowa and in this Court that there is a strong presumption founded on long experience and observation that the movement of a river has occurred by gradual

erosion and accretion rather than avulsion (see the Wilson principal brief at pages 39 and 40).

Once again, it seems appropriate to remind counsel for the Tribe that the Court of Appeals did not say that plaintiffs had sustained any burden of proof. It said:

> Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. *Presumptively*, at least, this right has never been extinguished. (Emphasis ours.) (App. A.17, see also App. A.25).
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>
> We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194 (App. A.62).
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> • • •
>
> Under the circumstances we hold that the defendants have failed in sustaining their burden of proof under § 194 (App. A.65).
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> • • •
>
> Although it is possible that the land represented by bar C may have completely eroded, . . . the record is insufficient to prove what actually occurred (App. A.44).
>
> • • •
>
> None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstances shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion (App. A.49).
>
> • • •
>
> These established facts do not prove that either accretion or avulsion caused the river's movement (App. A.62).
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> • • •
>
> We conclude on the basis of an overall review of the record that it is entirely speculative to determine



> when or how the thalweg moved to the position shown on the 1923 map (App. A.65).

Respectfully submitted,


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